UTAH SUPREME COURT ADVISORY COMMITTEE
ON RULES OF CIVIL PROCEDURE

Meeting Minutes – May 25, 2016

Present:	Jonathan Hafen, Terri McIntosh, Judge Toomey, Trystan Smith, Steve Marsden, James Hunnicutt, Kent Holmberg, Rod Andreason, Amber Mettler, Sammi Anderson, Judge Blanch, Judge Furse, Leslie Slaugh
Telephone:	Lori Woffinden, Judge Pullan
Staff:	Nancy Sylvester, Heather Sneddon
Guest:	Zachary Myers

I. Welcome and approval of minutes. [Tab 1] – Jonathan Hafen

Jonathan Hafen welcomed the committee and reported on the committee's presentation at the district judges' conference and the positive feedback received. Judge Pullan commented that the presentation was valuable and provided exceptional training for judges. Mr. Hafen noted that Judge Blanch's presentation on Rule 7 was particularly compelling.

With minor edits to the meeting minutes from April, Rod Andreason moved to approve them. The motion was seconded by James Hunnicutt and passed unanimously.

II. Rule 4(d)(1)(A), Personal Service. [Tab 2] – Zachary Myers

Zachary Myers, an associate at a small firm in Bountiful, presented to the committee. He does a lot of landlord/tenant work and has been speaking with Senator Fillmore regarding what he believes to be an unfair rule regarding service of process. Under Rule 4(d)(1)(A), service may be accomplished by leaving papers at the defendant's abode with a person of suitable age and discretion. In his experience, this rule does not provide due process. He reported that, many times, defendants are not receiving actual notice and defaults are entered without them having had an opportunity to respond. The problem is exacerbated in landlord/tenant cases where the tenant has only 3 days to respond to a summons. Mr. Myers said that landlords take advantage of the rule by leaving summons and complaints with roommates, who oftentimes are not motivated to give the documents to the named defendant. Because the rules permit service in this matter, default judgments are difficult to get set aside. He suggested that this may even present constitutional due process concerns.

Discussion:

- Mr. Hafen raised the situation where a defendant is ducking service. Mr. Myers responded that those defendants may be served through other means, including by mail or publication. Steve Marsden questioned why a roommate is not of suitable age or discretion, and why a roommate would not be motivated to tell the defendant about service. Mr. Myers responded that many times, one roommate is not paying his/her share of the rent and does not want the others to know. Trystan Smith said that if the defendant did not receive notice in that situation, the defendant should be able to get the default set aside. Mr. Myers reported that he has had situations where the default is not set aside because the landlord followed the rule, even if the

defendant did not receive actual notice. The eviction is the greater punishment, however, because that goes on a tenant's credit report and the tenant often cannot rent again.

- Mr. Marsden asked why the 3-day notice posted on the door does not ameliorate the issue. Mr. Myers said that one roommate will remove it from the door. And often the notice does not state what the lease violation is. Judge Blanch commented that he has not heard of this problem, and thinks that he would have if it was happening routinely. Mr. Marsden said that he thinks the requested solution is too big to address the rather narrow problem presented. Mr. Hunnicutt agreed, and said that he was opposed to it from a family law perspective. He would want input from landlord attorneys on it. Mr. Myers said that he is mainly interested in addressing the rule from a landlord/tenant perspective, but believes there is an argument to be made that the rule is unfair generally. Terri McIntosh commented that the rule has been around for years, and asked whether Mr. Myers had conducted any research regarding its constitutionality. Mr. Myers said he had not. Ms. McIntosh proposed that he prepare something that is specific to landlord/tenant cases for the committee to consider; she is not inclined to change rules that have been around for years on both the state and federal level. Mr. Hafen suggested that Mr. Myers also look at Rule 26.3.

- The committee advised Mr. Myers that it will want to hear from attorneys on both sides with respect to his proposed rule change. Judge Blanch also commented that although these orders are more disruptive because of the eviction aspect, for that same reason, you can typically have greater confidence that the defendant knows about the lawsuit because it is the place from which the landlord is trying to remove the tenant. Rod Andreason suggested that it might be more fruitful for Mr. Myers to discuss with Senator Fillmore the prospect of making it a misdemeanor to remove a 3-day notice from a door. Mr. Myers said that the 3-day notice doesn't always give notice that there is going to be a lawsuit. Judge Blanch suggested that the legislature could prevent putting a 3-day notice up that does not give notice of a potential lawsuit. Mr. Hunnicutt commented that he would also like to know how this issue is addressed in other states.

- Mr. Hafen thanked Mr. Myers for his time and input. The committee looks forward to receiving a narrower proposal from him.

III. Rule 7A, Motion for Order to Show Cause. [Tab 3] – Nancy Sylvester, James Hunnicutt

Nancy Sylvester informed the committee that the Code of Judicial Administration has a rule that covers motions for orders to show cause, but it only applies in the Fifth and Sixth Districts. Mr. Shea has suggested making it into a civil procedure rule. According to Judge Blanch's suggestion, she has added a note that the rule does not apply in criminal cases because those are governed by statute. Mr. Hunnicutt would also prefer that this rule not apply in domestic cases.

Discussion:

- Mr. Marsden suggested striking "personal knowledge" from line 5 in both places; it is a foundational aspect of an affidavit and declaration. Judge Blanch suggested that the note refer to the specific criminal statute: UCA § 77-18-1, *et seq*.

- The committee discussed the different contexts in which members have seen motions for orders to show cause, outside of the domestic arena, and whether problems exist such that a rule

should be adopted. Judge Pullan commented that having a rule would help delineate the situations in which a motion for order to show cause is appropriate; he has seen motions inappropriately styled. Judge Blanch also commented that having a rule with guidelines on how to address violations of court orders would be helpful.

- The committee also discussed at length whether an initial hearing/meeting on a motion for order to show cause should be set, with a second evidentiary hearing scheduled later. Many committee members commented that an initial hearing is very helpful from an efficiency standpoint, as it often narrows the issues.

- Mr. Hafen and Ms. Sylvester raised the issue of the rule requiring the submission of a proposed order, which the committee discussed. Judge Blanch said that Rule 7 would likely need to be amended to identify motions for orders to show cause as an exception if proposed orders are to be submitted. Mr. Hunnicutt commented that motions for orders to show cause are filed all the time in domestic cases, and proposed orders are always submitted. Practitioners want it to be easy for the court or commissioner to enter, but each district handles these motions in their own way. Judge Pullan commented that contempt has developed in the caselaw, but in his experience, domestic attorneys are so used to how they handle these motions that domestic procedure is largely untethered from the caselaw. In his experience, the 3-step process is pretty consistent: an order was entered, the party knew about it, the failure to comply was willful, and the party seeking sanctions bears the burden of proof. The degree of proof depends on the sanction sought. Criminal sanctions require proof beyond a reasonable doubt; civil sanctions are based upon a preponderance of the evidence. The committee discussed further the practice of the domestic bar in the various districts.

- The majority in attendance were in favor of adopting a rule on motions for orders to show cause. Through further discussion of whether to include a proposed order, several members commented that it would be useful in this context, particularly if the order is simply to show up to the initial conference. Amber Mettler commented that she doesn't believe an amendment to Rule 7 would be necessary because under Rule 7A(c), a judge may act on the motion without requiring a response. Judge Blanch commented that the OSC nomenclature is also used with respect to judges' OSC calendars. The note should say that the rule doesn't have anything to do with the court's discretion to issue OSCs in cases that aren't being prosecuted.

- Judge Pullan commented that the committee should consult closely with the domestic bar on this rule, as it will be used in the domestic arena 90% of the time. Mr. Hunnicutt commented that the Second District is opposed to this approach; they follow a one-step process and prefer it. Several committee members commented on the usefulness of a rule that spells out what is required for these motions, particularly in arenas where they are not often used. Others commented that these motions have been filed since time immemorial; you learn how to do them by doing them and contacting the court clerks.

- Judge Blanch commented that the rule doesn't address the CJA—that would need to be amended to address what commissioners are permitted to do. Rule 108 would also need to be addressed. He doesn't believe the pushback from the domestic bar really goes to the rule—it has more to do with the interplay between the rule, the CJA and Rule 108, which is a separate issue. This rule helps people who don't routinely come to court to enforce orders by giving them a procedure to follow. The committee also discussed whether parties should specify what

type of contempt they are seeking, whether it be criminal, civil, or both, and where that should be specified.

- Mr. Marsden suggested that the rule needs further study. Rule 70 also addresses this issue with respect to judgments requiring specific acts, and permits a finding of contempt in appropriate cases. The committee ought to figure out how this may butt up against Rule 37 procedure as well. He is not opposed to the rule, but it may be a big change. Judge Pullan commented that we also have a contempt statute, which adds another layer. Trystan Smith suggested that a subparagraph be added that the court may issue any other relief the court deems necessary at the first hearing. If the court wants an evidentiary hearing, it can proceed with that. Mr. Hafen asked whether that would solve the problem for commissioners. Mr. Hunnicutt commented that it may, but suggested that commissioners be invited to comment. Other committee members questioned whether that would defeat the purpose of the rule; if you don't have to file a response because the first hearing is just a scheduling hearing, but the judge is permitted to issue sanctions at that hearing, you may be prejudiced if you didn't file a response or put evidence in front of the judge. The committee also discussed the current practice in Third District in domestic cases, where commissioners certify the contempt decision to the judge, and the other rules that come into play in domestic cases.

- Mr. Hafen proposed that the rule be studied by a subcommittee over the summer, and that the subcommittee report back in September. Mr. Hunnicutt, Mr. Slaugh, and Judge Blanch agreed to serve on the committee and to invite ex officio members from other districts.

IV. Rule 7, Pleadings Allowed, Motions, Memoranda, Hearings, Orders. [Tab 4] – Nancy Sylvester

Ms. Sylvester reported that Brent Johnson has raised a concern regarding Rule 7 unfairly disadvantaging pro se litigants by setting response deadlines according to the filing rather than service date. Pro se litigants don't have the benefit of e-filing, so there is a delay with respect to service upon them. He proposed changing lines 39, 55, 78, and 81, to refer to "served" rather than "filed."

Discussion:

- Ms. Anderson commented that the committee just changed the rules to refer to the filed date to make them consistent. Ms. Sylvester confirmed that the 2013 amendments changed the rules from "served" to "filed." The committee discussed the reasons for the change and concluded that it was not a good idea to change them back.

V. Rule 34(b)(2)(A)-(C), Requests for Production. [Tab 5] – Nancy Sylvester, Paul Stancil

Ms. Sylvester discussed the email from Paul Stancil on what the committee should and should not consider changing with respect to Rule 34. The subcommittee thinks we should seriously consider conforming to subsections (b) and (c) of the federal rule. According to Mr. Stancil, requiring specificity for objections to Rule 34 requests, and declaring whether documents are being withheld on the basis of those objections, will help alleviate the problem with boilerplate objections.

Discussion:

- The committee discussed the meaning of Rule 34(b)(2)(C) and what it might look like in practice. Judge Furse explained that her expectation in federal court is that specific objections must

describe whether documents are being withheld based on the objections. Mr. Marsden raised the issue of large corporate clients with thousands of employees and dozens of locations; he cannot identify whether specific documents are being withheld because he does not know if they exist. He should be able to object to the overbreadth of a request without having to conduct a search that is overbroad and unreasonable. Judge Pullan said that the comment to Federal Rule 34 may clarify the discussion. The committee reviewed and discussed the comment. Under the new rule, Ms. Anderson said that if you make an overbroad objection, you'll need to identify what documents or date ranges are relevant, and perhaps which locations you have searched for those documents. Mr. Marsden said that he should not have to explain the ins-and-outs of his larger corporate clients just so that the other side can write better requests. The committee discussed the practical implications of Mr. Marsden's comments. Judge Blanch said that, in some contexts, by describing what has been produced, it will be obvious what has not been produced. In other contexts, it will be unclear as to whether the producing party has withheld anything.

- Rod Andreason commented that the rule's language only requires that the producing party state that documents have been withheld. It does not require specifics as to which documents have been withheld. Mr. Smith said that the last sentence of the federal note would be helpful: "An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been 'withheld.'" Judge Pullan commented that the rule is designed to discourage objecting when you don't really have a good reason. Why object if you don't have anything to produce? Mr. Marsden responded that you waive the objection if you don't make it. Mr. Hafen said that the proposal is to remove that portion of the rule (line 36). Judge Furse commented that she would advise leaving that sentence in. Ms. Anderson commented that that's why people are raising so many objections. Mr. Andreason said that he would rather have too many objections upfront than an unlimited time period to make more objections. Mr. Marsden agreed.

- Judge Blanch raised the concern that lawyers may try to find objections and criteria that are reasonable on their face to preclude the discovery of a bombshell. Judge Pullan asked whether those with significant civil practices could live with a rule where they had to specifically identify categories of documents they were not disclosing based on their objections. Mr. Marsden said that it is much easier for him to say what he is producing and why, rather than explain what he is not producing. A date cut-off is one thing, but it is hard to identify what he has not looked for. Ms. Sylvester noted that, under the federal comments, any objection that states the limits of what has been searched qualifies as a statement that materials have been withheld. Several committee members favored adding the last sentence of the federal note to the state rule. Judge Furse suggested that the last two sentences of the note be added.

- Ms. McIntosh suggested that the committee consider smaller changes to Rule 34 to fine-tune what we already have. We just did significant discovery rule changes not too long ago. Judge Blanch commented that the federal rule is also brand new; it makes sense to see what the experience is in the federal system and then make sensible changes to our own rule along the way before we adopt the federal rule wholesale. Mr. Marsden agreed. Judge Blanch suggested that perhaps the best way to address changes is through a committee note rather than changes to the rule.

- Ms. McIntosh proposed adding the first sentence of Federal Rule 34(b)(2)(C) to line 36 of the state rule, right in front of "the party." Lines 32-39 would stay in, and lines 20-31 would come

out. Mr. Slaugh also suggested including the last line of the federal note in a committee note. Ms. Anderson seconded Ms. McIntosh's motion. Mr. Hunnicutt commented that he liked the word "specificity" in line 24, and thinks that should be kept. Mr. Hafen suggested adding that to line 36, since lines 20-31 will not be added. Mr. Hunnicutt agreed. Ms. McIntosh renewed her motion with that amendment, and Ms. Anderson seconded. The motion passed unanimously. Rule 34 will be reviewed again next month with the foregoing amendments.

VI. Adjournment.

The meeting adjourned at 5:55 pm. The next meeting will be held on June 22, 2016 at 4:00pm at the Administrative Office of the Courts, Level 3.